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No. 91-440

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

GOLDBERG & FELDMAN FINE ARTS, INC.,
and PEG GOLDBERG,

Petitioners,

v.

AUTOCEPHALOUS GREEK-ORTHODOX CHURCH OF CYPRUS
and THE REPUBLIC OF CYPRUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS R. KLINE

(Counsel of Record)

THOMAS E. STARNES

ANDREWS & KURTH L.L.P.

1701 Pennsylvania Avenue, N.W.
Suite 200

Washington, D.C. 20006

(202) 662-2700

JOHN DAVID HOOVER

SALLY F. ZWEIG

JOHNSON, SMITH, DENSBN, &

WRIGHT & HEATH

One Indiana Square,

Suite 1800

Indianapolis, Indiana 46204

(317) 634-9777

Attorneys for Respondents

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption. The respondent, the Autocephalous Greek-Orthodox Church of Cyprus, is a religious corporation under the laws of Cyprus. It has no stock, however, and no parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Autocephalous Greek-Orthodox Church of Cyprus ("Church of Cyprus") and the Republic of Cyprus, respectfully request that the Court deny the petition for a writ of certiorari filed by petitioners Goldberg & Feldman Fine Arts, Inc., and Peg Goldberg (collectively, "Goldberg"), which seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit in this case. Because Goldberg's petition ("*Petition*") is frivolous and advances arguments not previously raised by Goldberg, the Republic and the Church of Cyprus also seek an award of just damages and double costs pursuant to Supreme Court Rule 42.2.

OPINIONS BELOW

The opinions and judgments challenged in, and included in the appendix to, the Petition are not the only opinions and judgments that have been rendered in this case or that have addressed the existence of subject matter jurisdiction. On October 24, 1990, the United States Court of Appeals for the Seventh Circuit affirmed an August 3, 1989 decision by the United States District Court for the Southern District of Indiana awarding possession of the Byzantine mosaic fragments at issue in this case to the Church of Cyprus. That opinion by the court of appeals, which receives scant mention by Goldberg, specifically addressed the issue of subject matter jurisdiction, is reported at 917 F.2d 278, and is reprinted in the appendix hereto. (Appendix ("App.") at A-5.)¹ The district court's opinion is reported at 717 F. Supp. 1374, and is reprinted in the appendix hereto. (App. at A-43.) In addition, Goldberg's appendix reprints the Final Judgment and Order issued by the district court on May 3, 1991, but omits the memorandum opinion issued by the district court on the same date. That opinion is not reported, but is reprinted in the appendix hereto. (App. at A-1.)²

¹ As explained below, the court of appeals denied Goldberg's petition for rehearing and suggestion for rehearing *en banc* on November 21, 1990. (App. at A-41.) On February 20, 1991, Justice Stevens denied Goldberg's application for an extension of time within which to file a petition for a writ of certiorari seeking review of the court of appeals' October 1990 decision. (App. at A-109.)

² In addition to failing to include several opinions in her appendix, Goldberg has violated Supreme Court Rule 14.1(k)(ii) by failing to append numerous other orders, judgments and opinions issued by the lower courts, including (a) the Seventh Circuit's November 21, 1990 denial of Goldberg's petition for rehearing and suggestion for rehearing *en banc* (App. at A-41); (b) the district court's Order of November 9, 1990, denying a motion by Goldberg to set aside the judgment of possession based on alleged newly-discovered evidence (App. at A-111); (c) the court of appeals' March 19, 1991 dismissal of Goldberg's appeal of that Order for failure to prosecute (App. at A-125); and (d) the letter from the Clerk of this Court indicating that Justice Stevens had, on February 20, 1991, denied Goldberg's application for an extension of time to file a petition for a writ of certiorari seeking review of the court of appeals' October 1990 decision. (App. at A-109.) Because reference to these prior orders and judgments is necessary to a full understanding of the extent to which the issue of subject matter jurisdiction has been raised and resolved in the courts below, the Church and the Republic of Cyprus have incurred the substantial expense of including these orders and judgments in

(Footnote continued on next page)

JURISDICTION

The Church and the Republic of Cyprus take no issue with Goldberg's statement of the basis for this Court's jurisdiction. The facts demonstrating the existence of federal subject matter jurisdiction, which Goldberg claims is lacking, are set forth below in the Statement of the Case.

STATUTES INVOLVED

Goldberg's statement of the statutes involved omits subparagraph "(4)" of 28 U.S.C. § 1332(a). When this action was filed, the pertinent parts of 28 U.S.C. § 1332(a) read:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

* * *

(2) citizens of a State and citizens or subjects of a foreign state;

* * *

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).¹

STATEMENT OF THE CASE

The Church of Cyprus and the Republic of Cyprus filed this action in the United States District Court for the Southern District of Indiana on March 29, 1989. They sought principally

(Footnote continued from previous page)

their appendix to this brief. However, because Supreme Court Rule 14.1(k)(ii) required Goldberg to include all opinions, orders and judgments rendered in this case in her appendix, the Church and the Republic of Cyprus seek an award of the costs they have incurred to correct Goldberg's omissions in this regard.

¹ This action was filed before May 18, 1989, which was the effective date of 1988 amendments to 28 U.S.C. § 1332 that, among other things, increased the "amount in controversy" requirement from \$10,000 to \$50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Title II, §§ 201-203, 102 Stat. 4646 (1988).

to recover from Goldberg possession of four fragments of a Byzantine mosaic stolen from the apse of the Church of the Panagia Kanakaria ("Kanakaria Church") in Lythrankomi, Cyprus, where the mosaic had been installed in the early part of the Sixth Century.⁴ The complaint, which appears in the appendix hereto, also sought the recovery of damages attributable to the loss of use of the mosaics and any physical damage Goldberg may have caused to the mosaics. (*App.* at A-127.)

The complaint invoked federal diversity jurisdiction pursuant to 28 U.S.C. § 1332. (*App.* at A-128.) The complaint stated that the amount in controversy exceeded \$10,000. (*App.* at A-128.) The complaint identified the Church of Cyprus as "an autonomous and independent branch of the Christian Orthodox Church," with its principal offices in Nicosia, Cyprus. (*App.* at A-127.) The Republic of Cyprus was identified in the complaint as a foreign state. (*App.* at A-127.) Goldberg & Feldman Fine Arts, Inc., was identified as an Indiana corporation having its principal place of business in Indiana. Peg Goldberg was described in the complaint as a citizen of Indiana. (*App.* at A-127.)

Goldberg answered the complaint on April 19, 1989. (*App.* at A-137.) The answer admitted that the Republic of Cyprus is a foreign state; that Peg Goldberg is an Indiana citizen; that

⁴ Goldberg erroneously states that the mosaic fragments were taken from "an abandoned church in the far northern portion of the Turkish Federated Republic of Cyprus." (*Petition* at 5.) In a finding Goldberg has never questioned on appeal, the district court held that neither the Kanakaria Church, nor its mosaic, was ever abandoned. (*App.* at A-86.) Moreover, the Kanakaria Church is located in the town of Lythrankomi, which is part of the Republic of Cyprus. There is no record of any "Turkish Federated Republic of Cyprus." (*Petition* at 5.) Likely, Goldberg meant to refer either to the so-called "Turkish Federated State of Cyprus" ("TFSC"), or to the so-called "Turkish Republic of Northern Cyprus," successive regimes that have purported to govern northern portions of Cyprus since it was invaded and occupied by Turkish troops in 1974. As the Seventh Circuit held, these alleged "governments" were recognized only by Turkey; "all other nations in the world—including the United States—have never recognized them, and continue to recognize the Republic of Cyprus . . . as the only legitimate government for all Cypriot people." (*App.* at A-7-A-8.) Indeed, the court of appeals rejected Goldberg's contention that certain "TFSC" edicts had affected the Church of Cyprus' title to the mosaics, refusing to honor "TFSC" decrees because the "Republic of Cyprus remains the only recognized Cypriot government, the sovereign nation for the entire island." (*App.* at A-32.)

Goldberg & Feldman Fine Arts, Inc., is an Indiana corporation having its principal place of business in Indiana; and that subject matter jurisdiction existed pursuant to 28 U.S.C. § 1332. (*App.* at A-137-A-138.)

Before the trial, the issue of money damages was severed from the issue of right to possession of the mosaics. (*App.* at A-46.) Trial on the issue of possession began on May 30, 1989, and lasted six days, except for one witness who testified later by deposition. On August 3, 1989, the district court issued a Memorandum of Decision and Order awarding possession of the mosaics "to the true and rightful owner, the Church of Cyprus." (*App.* at A-99.) Although Goldberg was not then challenging subject matter jurisdiction, the district court determined that Peg Goldberg and her corporation are Indiana citizens; that the Republic of Cyprus is a sovereign nation; and that the Church of Cyprus is a religious organization with its principal offices in Nicosia. (*App.* at A-46.) Thus, the district court explicitly ruled that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), because of the diversity of citizenship of the parties. (*App.* at A-46.)

On August 21, 1989, Goldberg appealed the district court's judgment on the issue of possession to the United States Court of Appeals for the Seventh Circuit. Goldberg's initial jurisdictional statement and initial brief to the Seventh Circuit made no argument that subject matter jurisdiction was lacking. (*App.* at A-15.) On November 17, 1989, however, Goldberg filed an amended jurisdictional statement, which argued that the trial record did not establish that the Church of Cyprus was a "citizen or subject of a foreign state" within the meaning of 28 U.S.C. § 1332(a)(2). (*App.* at A-15-A-16.) Goldberg claimed that the record lacked evidence that the Church of Cyprus was "incorporated" under the laws of Cyprus. (*App.* at A-16.) According to Goldberg, if the Church of Cyprus was a voluntary association, not a corporation, and if the church had members in Indiana, complete diversity would not exist. *Id.*³ The parties then filed separate briefs on this jurisdictional issue.

On October 24, 1990, the Seventh Circuit affirmed the district court's judgment awarding possession of the mosaics to

³ There is no evidence in the record indicating that any Indiana citizens are members of the Church of Cyprus.

the Church of Cyprus. In an opinion by Chief Judge Bauer for a unanimous panel, the court of appeals also expressly rejected Goldberg's challenge to subject matter jurisdiction. The court held that the evidence at trial "sufficiently established that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus is a 'citizen or subject' of that state" for the purposes of diversity jurisdiction. (*App.* at A-17.) The court of appeals based this holding upon trial evidence (a) that the Constitution of the Republic of Cyprus recognizes the existence of the Church of Cyprus and explicitly accords it the exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter; (b) that a statute of the Republic of Cyprus permitted religious corporations such as the Church of Cyprus to own and register property in their own names; and (c) that the Church of Cyprus had, pursuant to that statute, registered its title to the Kanakaria Church in the Land Registry Office of the Republic of Cyprus. (*App.* at A-17.) The court of appeals denied Goldberg's petition for rehearing and suggestion for rehearing *en banc* on November 21, 1990. (*App.* at A-41.)

On February 19, 1991, the ninetieth day after the denial of rehearing, Goldberg, acting through new counsel, filed an application with the Supreme Court seeking a 60-day extension of time to file a petition for a writ of certiorari to review the court of appeals' October 1990 decision. A copy of that application is included in the appendix hereto. (*App.* at A-145.) That application announced only one issue which Goldberg would submit for review by the Supreme Court: "whether and when the courts of the United States should give effect to the domestic acts of a foreign government not recognized by the United States government." (*App.* at A-146.) The application made no mention of any intent to challenge the court of appeals' holding that subject matter jurisdiction existed.⁶ On February 20, 1991, Justice

⁶ The application also made no reference to an Agreed Order, entered by the district court on August 8, 1989, which reflected Goldberg's agreement not to seek an extension of time in connection with any appeal. (*App.* at A-105.) After Justice Stevens denied the application, Goldberg's counsel filed a reply brief indicating that counsel would not have filed the application for an extension of time had they known about the order barring Goldberg from doing so.

Stevens denied, without opinion, the application for an extension of time within which to file a petition for a writ of certiorari.

On August 6, 1990, while her first appeal was pending in the Seventh Circuit, Goldberg filed a motion in the district court to set aside the judgment of possession based on alleged newly-discovered evidence. The district court denied that motion on November 9, 1990 (*App.* at A-111), and Goldberg filed a notice of appeal of that decision on December 7, 1990. That appeal was dismissed by the court of appeals on March 19, 1991, for failure to prosecute, Goldberg having failed to file a brief or to respond to an order to show cause as to why the appeal should not be dismissed. (*App.* at A-125.)

Having exhausted all appeals on the judgment of possession, and having abandoned her second appeal to the Seventh Circuit, Goldberg, acting without counsel, filed a motion in the district court on April 11, 1991, seeking dismissal of the case for lack of subject matter jurisdiction.⁷ Incomprehensibly, Goldberg argued that the Republic of Cyprus was not a "foreign state" within the meaning of 28 U.S.C. §§ 1332 or 1603(a), and, again, that the Church of Cyprus was not a "citizen or subject of a foreign state." Goldberg also appeared to argue that neither she nor her corporation were citizens of a "State" within the meaning of 28 U.S.C. § 1332. On April 25, 1991, the Church and the Republic of Cyprus opposed the motion to dismiss, sought sanctions for its filing, and moved to dismiss voluntarily its claim for damages.

On May 3, 1991, the district court denied Goldberg's motion to dismiss, holding that "this Court has subject matter jurisdiction under any rational reading of the diversity statute." (*App.* at A-4.) Under that statute, the district court held, Goldberg and her corporation are clearly citizens of a State and the Republic of Cyprus is clearly a foreign state. (*App.* at A-3-A-4.) Moreover, the district court held that the Seventh Circuit, in a decision binding under the "law of the case" doctrine, had already conclusively determined that the Church of Cyprus is a citizen or subject of a foreign state under the

⁷ In this motion for dismissal, Goldberg also inexplicably sought dismissal for lack of *personal* jurisdiction. As the Petition raises no challenge to the existence of personal jurisdiction, Goldberg apparently does not seek this Court's review of that issue. In any event, the district court's rejection of Goldberg's attack on personal jurisdiction was correct (*App.* at A-2), and no reason exists to warrant review of that ruling by this Court.

diversity statute. (*App.* at A-4.) Having denied the motion to dismiss, the district court authorized the voluntary dismissal of the damages claim, thereby dispensing with the only remaining claim in the case, and issued a final judgment confirming resolution of all issues in favor of the Church and Republic of Cyprus.¹ (*Petitioners' App.* at A-3.)

On May 10, 1991, Goldberg appealed the district court's May 3 decision to the Seventh Circuit. On June 21, 1991, after receiving only Goldberg's brief, the court of appeals summarily affirmed the district court's judgment. (*Petitioners' App.* at A-1.) The court of appeals held that it had decided the jurisdictional issues in its earlier opinion and that Goldberg "cannot collaterally attack that decision by challenging subject matter jurisdiction in this case." (*Petitioners' App.* at A-2.)

Acting through yet another attorney, Goldberg filed the Petition in this Court within 90 days of the Seventh Circuit's most recent decision. With that filing, Goldberg has commenced the second proceeding in this Court, the fifth appellate proceeding overall (not including motions for stay and petitions for rehearing), and the seventh post-trial proceeding to attack the district court's initial judgment awarding possession of these priceless, sacred and ancient mosaics to their rightful owner, the Church of Cyprus. For the reasons set forth below, the Church and the Republic of Cyprus ask that this vexatious and frivolous petition be denied, and that an award of just damages and double costs be imposed upon Goldberg.

¹ The district court denied the motion for sanctions filed by the Church and the Republic of Cyprus, but granted their motion to vacate a stay previously entered by the district court, which had limited movement of the mosaics during the pendency of the litigation. (*App.* at A-4.) Subsequent motions to "impound" the mosaics pending appeal of the district court's May 3 decision were denied by both the district court and the court of appeals, and the mosaics were returned to Cyprus.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decisions Below Fully Accord With The Decisions Of This Court, The Constitution And All Pertinent Federal Statutes

Goldberg argues that this Court should grant the Petition because the rulings of the courts below regarding subject matter jurisdiction purportedly conflict with this Court's prior decisions and with limits placed on federal jurisdiction by the Constitution of the United States and the Foreign Sovereign Immunities Act of 1976. Apparently abandoning prior rationales, and based entirely on a misreading of *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), Goldberg now advances the argument that diversity jurisdiction is lacking solely because the Church and the Republic of Cyprus are "foreign plaintiffs." (*Petition* at 11-14.)

Goldberg's arguments are meritless. Federal jurisdiction based on diversity of citizenship unquestionably exists in this case, and the lower courts' holdings to that effect comport fully with the Constitution, with this Court's prior decisions and with all pertinent federal statutes.

Article III, Section 2, of the Constitution provides that federal judicial power extends to all controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. Pursuant to this constitutional authority, Congress has granted federal district courts jurisdiction over all civil actions which satisfy the "amount in controversy" requirement and are between (a) "citizens of a State and citizens or subjects of a foreign state," or (b) "a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." 28 U.S.C. §§ 1332(a)(2), (4).⁹

⁹ Section 1603(a) provides that a "foreign state," subject to an irrelevant exception, "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). Since no "agency or instrumentality of a foreign state" is a party in this case, section 1603(b) is irrelevant.

These constitutional and statutory provisions permit no conclusion but that federal subject matter jurisdiction based on diversity of citizenship exists in this case. Goldberg has never denied that the amount in controversy exceeds \$10,000. Nor does she dispute—indeed, her answer to the complaint admitted—that both she and Goldberg & Feldman Fine Arts, Inc., are citizens of Indiana. (*App.* at A-137.)¹⁰ In addition, although she briefly argued the contrary to the district court, Goldberg now concedes that the Republic of Cyprus is a “foreign state” and that the Church of Cyprus is a “citizen or subject of a foreign state.” Thus, with a foreign state and a citizen thereof aligned as plaintiffs against citizens of Indiana, subject matter jurisdiction based upon diversity of citizenship is supported by the diversity clauses contained in both the Constitution and Section 1332(a) of Title 28.

This Court has repeatedly affirmed the existence of diversity jurisdiction in actions brought by foreign states, or citizens or subjects thereof, against citizens of the United States. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (action by instrumentality of the Cuban government against an American commodities broker); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (claims by Spanish subject against New York and Delaware corporations); *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126 (1938) (action by Russian sovereign against a New York banking corporation); *C.H. Nichols Lumber Co., v. Franson*, 203 U.S. 278 (1906) (action by citizen of Sweden against Washington State corporation); *Hennessy v. Richardson Drug Co.*, 189 U.S. 25 (1903) (suit by citizens of France against citizen of Nebraska); *The Sapphire v. Napoleon III*, 78 U.S. (11 Wall.) 164 (1871) (action by French sovereign against the American ship *Sapphire*).

¹⁰ As indicated previously, Goldberg argued in her April 1991 motion to dismiss that neither she nor her corporation were citizens of a “State” within the meaning of 28 U.S.C. § 1332(a). This argument, though difficult to comprehend, was apparently based on a contention that the statute’s use of a capital “S” indicated that the term “State” did not refer to any of the fifty states in the United States. As her answer to the complaint reflects, however, Goldberg has never denied that both she and Goldberg & Feldman Fine Arts, Inc., are Indiana citizens. (*App.* at A-137).

Despite this precedent and the plain meaning of the constitutional and statutory diversity clauses, Goldberg argues that the absence of subject matter jurisdiction is "confirmed" by the fact that jurisdiction was predicated on the Church of Cyprus "being 'a citizen or subject of a foreign state'" and the Republic of Cyprus being a foreign state. (*Petition* at 11-12 (emphasis in original)). According to Goldberg, the Church and the Republic of Cyprus, as "foreign plaintiffs," could not invoke federal diversity jurisdiction without running afoul of this Court's decision in *Verlinden*. (*Petition* at 11-14.)

The *Verlinden* decision, however, provides no support for Goldberg's position. In that case, a Dutch corporation filed an action for anticipatory breach of contract in federal district court against an instrumentality of the Federal Republic of Nigeria. *Verlinden*, 461 U.S. at 483. The plaintiff predicated subject matter jurisdiction upon the Foreign Sovereign Immunities Act of 1976 ("the Act"), 28 U.S.C. § 1330(a).¹¹ Reversing a decision by the United States Court of Appeals for the Second Circuit, this Court held that the "arising under" clause of Article III of the Constitution supported jurisdiction under the Act in actions by foreign plaintiffs against foreign states, even when the rule of decision may be provided by state law.¹² 461 U.S. at 494, 497-98. In language relied upon by Goldberg, however, the Court agreed with the Second Circuit that the Constitution's diversity clause did not support jurisdiction over a foreign plaintiff's claim against a foreign state or an instrumentality thereof. Because the diversity clause permits the exercise of jurisdiction over controversies between "a State, or the Citizens thereof, and foreign States, Citizens or Subjects," the Court wrote that "diversity

¹¹ In its entirety, 28 U.S.C. § 1330(a) provides: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."

¹² The "arising under" clause provides that federal "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S.Const. art. III, § 2.

jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs, since a foreign plaintiff is not 'a State, or [a] Citize[n] thereof.' " 461 U.S. at 492.

Goldberg wrongly construes this language from *Verlinden* as holding that diversity jurisdiction can never exist in actions by "foreign plaintiffs." The context of the *Verlinden* decision makes it plain, however, that the Court was explaining that the Constitution's diversity clause does not extend federal jurisdiction to actions by foreign plaintiffs *against foreign defendants*. Because the Constitution authorizes federal diversity jurisdiction only when one or more of the United States or its citizens is aligned against a foreign state or its citizens, diversity jurisdiction is lacking when, as in *Verlinden*, all of the parties are foreign states or instrumentalities or citizens thereof. The plain language of the Constitution and the diversity statute, however, clearly extend federal jurisdiction over suits by foreign plaintiffs (including a foreign state) against citizens of one or more of the United States. Neither *Verlinden*, nor any known decision of any federal court, has ever held to the contrary.

Goldberg also argues that *Verlinden* supports an argument that the Act "bars The Republic of Cyprus and the . . . Church of Cyprus from invoking the Diversity Clause of the U.S. Constitution in order to bring an action against either an individual citizen or a corporate citizen of the state of Indiana." *Petition* at 12-13. Yet, neither *Verlinden* nor the Act supports this baseless argument. The Act authorizes, but limits, the exercise of federal jurisdiction with respect to claims *against foreign states*. 28 U.S.C. §§ 1330, 1602-1611. The Act simply has no application to, and imposes no limitations on, claims against citizens of the United States.¹³ Likewise, *Verlinden* involved claims against an instrumentality of a foreign state and placed no constraints on suits against U.S. citizens. Thus, since

¹³ The 1976 passage of the Act did result in a change to the diversity statute. In Section 3 of the Act, Congress added subparagraph (4) to 28 U.S.C. § 1332(a) to make clear that diversity jurisdiction would not extend to disputes between U.S. citizens and a foreign state unless the foreign state is the plaintiff. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891 (1976).

the Church and the Republic of Cyprus sued only citizens of Indiana, neither the Act, nor *Verlinden*, can plausibly be construed as undermining the existence of subject matter jurisdiction in this case.¹⁴

In short, the Constitution, the decisions of this Court and all pertinent statutes support an exercise of diversity jurisdiction when, as in this case, a foreign state and a citizen thereof sue citizens of the United States. Goldberg's arguments to the contrary are completely unsupported and are based solely on a misreading of case law. Accordingly, because there is no conflict with the decisions of this Court, with the Constitution, or with federal law, there is no basis for granting the Petition.

II. The Petition Raises Arguments Not Presented To The Courts Below

It is well established that the Supreme Court generally "does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (question not presented in the court of appeals is not properly before the

¹⁴The Church and the Republic of Cyprus can make no sense of Goldberg's argument that "[t]he definitional parameters allowable under 28 U.S.C. § 1332 are clearly elaborated in 28 U.S.C. § 1332(d) and 28 U.S.C. §§ 1603(a) and (b) and cannot reasonably be construed to include a 'third country' such as Cyprus." (*Petition* at 13.) In 28 U.S.C. § 1332(d), the term "State" is defined as including "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." Unless Goldberg is again making the frivolous argument that Indiana is not a "State" within the meaning of the diversity statute, there is no occasion for reference to 28 U.S.C. § 1332(d). Similarly, 28 U.S.C. § 1603(a), which is incorporated by reference in the diversity statute, defines "foreign state" to include any "political subdivision" thereof and any "agency or instrumentality" thereof, terms which are defined in 28 U.S.C. § 1603(b). There is no contention in this case that any party is a political subdivision, or an agency or instrumentality, of a foreign state. Thus, unless Goldberg is arguing that the Republic of Cyprus is not a "foreign state," 28 U.S.C. §§ 1603(a) and (b) are equally irrelevant. (The reference in 28 U.S.C. § 1603(b) to a "third country" appears designed to bar claims of sovereign immunity when the purported agency or instrumentality of one foreign state is, in fact, an entity "created under the laws of any third country." That provision clearly has no application in this case.)

Supreme Court); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980). The Court departs from this principle only in exceptional cases involving important questions or "plain errors" by the lower courts that "seriously affect the fairness, integrity or public reputation of public proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); see also *Stone v. Powell*, 428 U.S. 465, 481 n. 15 (1976).

The Petition in this case violates this fundamental principle by advancing theories to attack subject matter jurisdiction that were never raised in the lower courts. Goldberg has never previously argued that subject matter jurisdiction is lacking because the Church and the Republic of Cyprus are "foreign plaintiffs." In her first appeal to the Seventh Circuit, Goldberg based her challenge to subject matter jurisdiction on a contention that the trial record lacked evidence to establish that the Church of Cyprus is a "citizen or subject of a foreign state" under 28 U.S.C. § 1332(a)(2). Based on a fact-specific review of the trial record in this case, the Seventh Circuit rejected that argument because the evidence amply supported a finding that the Church of Cyprus is a distinct juridical entity under Cypriot law. (*App.* at A-17.) That holding was consistent with the test for determining the citizenship of foreign entities adopted by this Court in *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 479-482 (1933), and Goldberg failed, in any event, to seek the Court's review of that holding in a timely fashion.¹⁵ Instead, she raised a new attack on subject matter jurisdiction by filing a motion to dismiss in the district court after all appeals of the district court's first judgment had been exhausted. Even then, however, Goldberg never argued that the existence of "foreign plaintiffs" barred the assertion of subject matter jurisdiction. Rather, she argued solely that she and her corporation are not citizens of a "State," that the Republic of Cyprus is not a "foreign state," and, again, that the Church of Cyprus is not a "citizen or subject of a foreign state." Not surprisingly, the district court and the court of

¹⁵ Indeed, Goldberg never sought review of that holding. As indicated previously, her application for an extension of time to seek review of the court of appeals' first decision in this case made no mention of any desire to present a question regarding subject matter jurisdiction. (*App.* at A-145.)

appeals summarily rejected these absurd arguments. (*App.* at A-3-4; *App.* at A-17.)

No basis exists for allowing Goldberg to present yet another theory for attacking subject matter jurisdiction in this case. Goldberg's new argument raises no important questions that must be reviewed in the interests of justice. Rather, to put an end to Goldberg's obsessive protraction of this litigation, the interests of justice demand that the Petition be categorically denied and that the Church and the Republic of Cyprus be awarded just damages and double costs.

CONCLUSION

Goldberg has presented no issue that warrants this Court's review. There is no rational basis for her belated argument that subject matter jurisdiction is lacking because the Church and the Republic of Cyprus are "foreign plaintiffs." All of the prerequisites for federal diversity jurisdiction clearly exist in this case. The lower courts' decisions in this regard conflict with no decisions of this or any other court, with no provision of the Constitution and with no federal statute. For all of the foregoing reasons, the respondents respectfully request that Goldberg's Petition be denied in its entirety. Moreover, given the frivolous nature of the Petition, the respondents respectfully request that they be awarded just damages and double costs pursuant to Supreme Court Rule 42.2.

Respectfully submitted,

THOMAS R. KLINE

(Counsel of Record)

THOMAS E. STARNES

ANDREWS & KURTH L.L.P.

1701 Pennsylvania Avenue, N.W.

Suite 200

Washington, D.C. 20006

(202) 662-2700

JOHN DAVID HOOVER

SALLY F. ZWEIG

JOHNSON, SMITH, DENSBOURN,

WRIGHT & HEATH

One Indiana Square, Suite 1800

Indianapolis, Indiana 46204

(317) 634-9777

Attorneys for Respondents